IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
July 22, 2008 Session

STATE OF TENNESSEE v. JAMES W. GRIFFITH

Direct Appeal from the Circuit Court for Rutherford County
No. F-58621 Don Harris, Judge

No. M2007-02164-CCA-R3-CD - Filed September 24, 2009

Following a jury trial, Defendant, James W. Griffith, was convicted of three counts of theft of property valued between $1,000 and $10,000; three counts of transacting business in this state without registering as a broker-dealer; three counts of selling an unregistered security; and two counts of employing a device, scheme, or artifice to defraud. All of the charged offenses were Class D felonies. Following a sentencing hearing, the trial court sentenced Defendant as a Range I, standard offender, to three years for each conviction. The trial court ordered Defendant to serve his convictions in counts two through eleven concurrently with each other but consecutively to his sentence in count one, for an effective sentence of six years. The trial court denied Defendant's request for alternative sentencing and ordered Defendant to serve his sentence in confinement. Following a hearing on Defendant's motion for new trial, the trial court granted Defendant's motion as to his three convictions of transacting business in this state without registering as a broker-dealer in counts 3, 9 and 10 of the indictment, and dismissed the charges in these counts. The trial court denied the motion as to all other issues. On appeal, Defendant challenges the sufficiency of the convicting evidence, the trial court's instructions to the jury, the State's election of offenses, and the length and manner of service of his sentence. After a thorough review, we conclude, as plain error, that counts 2, 4, 7, 8, and 11 of the indictment are fatally defective. We, therefore, reverse Defendant's convictions as to these counts of the indictment and dismiss counts 2, 4, 7, 8, and 11 of the indictment. We affirm the trial court's judgments as to Defendant's theft convictions in counts 1, 5, and 6. We affirm the trial court's judgments as to the length of Defendant's sentences for his theft convictions. We conclude, however, that the trial court erred in imposing consecutive sentences. Accordingly, we remand Defendant's judgments in counts 1, 5, and 6 to reflect that all sentences are to be served concurrently for an effective sentence of three years.

Tenn. R. App. P. 3 Appeal as of Right;
Judgment of the Circuit Court Affirmed in Part; Reversed in Part; and Modified

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and D. KELLY THOMAS, JR., JJ., joined.

Mitchell E. Shannon and Nathaniel Owens, Murfreesboro, Tennessee, for the appellant, James W. Griffith.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General; and Chad Jackson, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Cora Alston testified that she is the chief of securities registration for the Tennessee Department of Commerce and Insurance. Ms. Alston stated that under the Tennessee Securities Act of 1980 (the "Securities Act"), shares of stock must be registered with the Department of Commerce and Insurance before they are sold to Tennessee residents unless the sale falls within one of the statutory exemptions for registration. Ms. Alston explained that an exemption from the registration requirement may be based on the type of stock sold, such as stock listed on the New York or American Stock Exchanges, or based on the type of transaction in which the security is sold. One example of an exempt transaction is what is known as "the small transaction" in which stock is sold to fifteen persons or less in Tennessee within a twelve month period. The sales must be conducted without the aid of publicly disseminated advertisements or literature, and the purchasers must intend to hold the stock for investment purposes. Ms. Alston, citing Tennessee Code Annotated section 48-2-103(b)(4), stated that any purchaser who holds the stock for two years is presumed to have purchased the stock for investment purposes. Ms. Alston's interpretation is that a stock purchased with the intent of making a gain quickly would not qualify as an exempt transaction under the Securities Act, and the stock under that scenario must be registered with the State prior to its sale. Ms. Alston said that her records did not include a notice filing or registration statement for American Heritage Publishing, Inc. or American Heritage Publishing and Merchandising, Inc. Ms. Alston stated that these companies were not listed on the New York Stock Exchange or the American Stock Exchange.

On cross-examination, Ms. Alston said that no notices were required to be filed if the sale met the statutory definition of a "small transaction." Ms. Alston stated that it was the issuer's responsibility to meet all three qualifying requirements for the small transaction exception.

Larry Burton testified that he is the Department of Commerce and Insurance's section chief for the registration and regulation of brokerage firms, brokerage firm representatives, investment advisory firms and investment advisory firm representatives. Mr. Burton said that his duties include the administration of the regulatory provisions pertaining to the sellers of registered securities in Tennessee. Mr. Burton stated that according to his records, Defendant is not registered to sell securities in Tennessee as a broker-dealer.

Mr. Burton explained that the issuer of a security is a legal business entity such as a corporation, partnership, or limited liability company. Mr. Burton said that under certain circumstances, an associated person of the issuer, such as an officer of the company, may sell the company's securities on behalf of the issuer without registering as a broker-dealer so long as the associated person meets several criteria. Of these, the associated person may not receive any compensation directly related to the sale of the securities and must have on-going duties in the operation of the issuer's business. Mr. Burton explained that if the associated person received compensation as the result of the stock sale, then he or she would meet the definition of broker-dealer.

William Ray Thompson testified that he has been a builder/developer in Rutherford County for approximately twelve years. Mr. Thompson said that he had a ninth grade education, and he did not have any experience in the buying and selling of stock. Mr. Thompson said that his first stock purchase involved the shares of American Heritage Publishing, Inc.

Mr. Thompson said that he met Defendant in September 2003 after Defendant expressed interest in purchasing Mr. Thompson's home. Mr. Thompson met Defendant at the property and showed him the property's boundaries which encompassed approximately forty-seven acres. Mr. Thompson said that the listing price for the property at this point of time was $800,000. Defendant told Mr. Thompson that he had started a non-profit company which was going to build a memorial "hall of honor" dedicated to American veterans. Defendant also said that he had written a book which he anticipated selling to Wal-Mart, Inc., and he expected to receive a large sum of money in the near future based on the sale of the book. As a result, Defendant offered to pay cash for Mr. Thompson's home. Mr. Thompson said that he was anxious to sell the property and was willing to reduce the listing price to $725,000 in exchange for a cash transaction. Mr. Thompson said that he was "impressed with" Defendant, and their relationship was cordial.

Defendant executed a contract for the sale of the property, and a closing date was set. Mr. Thompson said that the closing date was rescheduled eight times. Defendant then approached Mr. Thompson about buying stock in American Heritage Publishing, Inc., a non-profit corporation of which Defendant served as president. Mr. Thompson expressed concern about receiving a return on his investment because the company was a non-profit organization. Defendant told him that the company's non-profit activities, which were dedicated to the establishment of a memorial for American veterans, were separate from the publishing and merchandising end of the business. Defendant said that he had contracts in place with Wal-Mart for the books published by American Heritage Publishing, Inc.

Defendant told Mr. Thompson that he wanted Mr. Thompson as an investor and as a member of the company's board of directors because Mr. Thompson was familiar with the Rutherford County area. Mr. Thompson said that Defendant guaranteed Mr. Thompson that he "would make $800,000 to $900,000 in 30 days" on his $10,000 investment. Mr. Thompson acknowledged that the investment sounded "too good to be true," but he stated that in addition to the contract on his

property, Mr. Thompson was aware that Defendant had placed a contract on a piece of property in Rutherford County valued at over $1,000,0000.

Mr. Thompson said that it was his understanding that American Heritage Publishing, Inc. planned to manufacture t-shirts, books, and memorabilia in connection with the veteran's memorial, and that Wal-mart had agreed to purchase all of the company's products. Both Defendant and Mr. Thompson talked to Mr. Thompson's attorney and accountant about the stock investment. Mr. Thompson acknowledged that both of his advisors told him to proceed cautiously. In accordance with his attorney's instructions, Mr. Thompson asked Defendant for a copy of American Heritage Publishing's corporate charter, but Defendant never produced one. Defendant also did not show Mr. Thompson a copy of the Wal-Mart contract or allow him access to the company's financial records.

Mr. Thompson said that he met Defendant on October 30, 2003, at a local real estate office, and paid Defendant $10,000 in exchange for stock in American Heritage Publishing, Inc. Mr. Thompson received a stock certificate issued by the company. Mr. Thompson said that Defendant asked Mr. Thompson to make the check payable to him instead of the company. Mr. Thompson said that he noted on the check that the money was for the purchase of "10,000 shares of stock in American Heritage Publishing, Incorporated." Mr. Thompson stated that Defendant cashed the check the same day.

Mr. Thompson said that Defendant contacted him later and asked Mr. Thompson to return the stock certificate because he had changed the name of the company to American Heritage Publishing and Merchandising, Inc. Defendant told Mr. Thompson that the "money [was] in place and . . . ready to be distributed" as soon as he issued a new stock certificate to Mr. Thompson. Mr. Thompson made a copy of the first stock certificate before returning it to Defendant. Defendant issued a stock certificate to Mr. Thompson for 10,000 shares of American Heritage Publishing and Merchandising, Inc., on March 30, 2004. Mr. Thompson said that Defendant told him that the company's merchandise would be offered for sale at Wal-Mart stores on July 4, 2004. Mr. Thompson went to a local Wal-Mart on that date but no merchandise was found.

Mr. Thompson said that Defendant did not inform him that he could not sell his stock for two years. Mr. Thompson stated that Defendant in fact told him several times that he had a buyer for Mr. Thompson's stock, but Mr. Thompson did not went to sell his shares of stock in light of the anticipated return on his investment. Mr. Thompson said, however, that he was willing to sell his shares of stock as soon as he had received the $800,000 or $900,000 promised by Defendant. Mr. Thompson said that Defendant never completed the purchase of his home, and Mr. Thompson never received any dividends from either American Heritage Publishing and Merchandising, Inc. or American Heritage Publishing, Inc.

Bridget Ann Jones, a local realtor, testified that she had almost completed her bachelor's degree, but she had limited experience in either the buying or selling of stock. Ms. Jones stated that she first met Defendant in late 2003 when he engaged her real estate company to assist him in locating property for the construction of a memorial dedicated to American veterans. Defendant told

Ms. Jones that his company, American Heritage Publishing, Inc., had published a book written by Defendant and had produced a line of t-shirts and other memorabilia, all of which it planned to sell to Wal-Mart in order to generate money for the construction of the memorial. Defendant told Ms. Jones that her investment in the company would help with the production of the book and other items in time for the placement of the products in Wal-Mart stores by July 4, 2004.

On February 17, 2004, Ms. Jones purchased shares of stock in American Heritage Publishing in exchange for $2,500. Defendant told Ms. Jones said that she would receive at least $100,000 as a return on her $2,500 investment. Ms. Jones understood that the funds would be paid after the company's merchandise was placed in Wal-Mart stores for sale on July 4, 2004. Ms. Jones said that she purchased additional shares of stock in the company on May 6, 2004, for $2,500. Ms. Jones stated that she bought the additional stock in order to increase the anticipated amount of her return on her investment. Ms. Jones stated that she completed both stock purchases with a check made payable to Defendant personally. Ms. Jones said that Defendant cashed both checks.

Ms. Jones said that at some point Defendant asked her to return her original stock certificate. Ms. Jones understood that there was a question about the company's non-profit status. Ms. Jones made a copy of her original stock certificate before she forwarded it to Defendant. Ms. Jones was issued a second stock certificate in the name of "American Heritage Publishing and Merchandising, Inc." As time passed, Ms. Jones said that she and Mr. Thompson asked for copies of any purchase contracts for the company's products, but Defendant did not show them any.

Ms. Jones stated that Defendant did not tell her that she must hold the stock for two years before selling it, and Ms. Jones said that she never intended to hold the stock for any length of time because she just "wanted the quick payoff." Ms. Jones stated that she never received any dividends from the company.

On cross-examination, Ms. Jones acknowledged that her requests for access to the company's books were verbal, not written, requests. Ms. Jones said that Defendant gave her a copy of the book that was to be sold at Wal-Mart stores. Ms. Jones understood that a second book was also being published by the company. Ms. Jones said that Defendant told her that the book would be distributed to tenth grade classes all over the United States.

Kimberly Ann Wilson testified that she lived in Wildwood, Georgia, and worked for an NBC affiliated television station in Chattanooga. Ms. Wilson met Defendant in 2004 when he approached the station about buying an advertising spot for his company, American Heritage Publishing. Defendant told Ms. Wilson that he had written a book which was going to be placed in all fifth grade classes throughout the country and also sold through Wal-Mart. In November 2004, Ms. Wilson purchased shares of American Heritage Publishing, Inc. for $5,000. Defendant cashed Ms. Wilson's check and told her that she would receive her first dividend in January 2005. Ms. Wilson stated that she had never received a dividend from the company and had never seen Defendant's book for sale in any store.

On cross-examination, Ms. Wilson said that the purpose of Defendant's advertising request was to inform the public about the American Veterans' Hall of Fame and to ask for donations to pay for the building's construction. Ms. Wilson said that the American Veterans' Hall of Fame had a website which could accept donations. Ms. Wilson said that it was her understanding that the idea of publishing a book about the American Constitution and Declaration of Independence arose out of Defendant's concern that American children were not being sufficiently taught about history and government.

Carmen Jones, a securities examiner with the Department of Commerce and Insurance, testified that she was responsible for investigating consumer complaints about investments in stocks, bonds and other instruments. As part of her investigation of American Heritage Publishing, Ms. Jones stated that she reviewed the bank accounts for Amvets Marketing, Inc., Amvets Hall of Honor, American Book Distributors d/b/a Future Voters of America, and four bank accounts in the name of American Heritage Publishing, Inc. Ms. Jones said that she did not find any deposits to these accounts which correlated to the amount of investments made by Mr. Thompson, Ms. Bridget Jones, and Ms. Wilson. Ms. Jones said that American Vets Hall of Honor was incorporated in Alabama on March 10, 2003. The company was incorporated in Tennessee on March 11, 2004, and dissolved on August 19, 2005. Ms. Jones said she did not verify the state of incorporation for American Heritage Publishing, Inc.

The State rested its case-in-chief, and Defendant presented his defense. Dan W. Strack testified that he currently worked for a small newspaper company in Jackson, Mississippi. Mr. Strack met Defendant in late 1999, when Defendant rented Mr. Strack's home after Mr. Strack was transferred by his company to the Kansas City, Kansas area. Defendant told Mr. Strack that he was working on a "civics book project." Mr. Strack stated that Defendant intended to purchase Mr. Strack's house at the beginning of 2000 after he had received government funding for his project. In the meantime, Defendant executed a six-month lease. Mr. Strack said that he was interested in Defendant's project, and he and Defendant spoke by telephone once a month while Defendant continued to rent Mr. Strack's home.

Mr. Strack stated that in November 2001, he quit his job and joined Defendant's company as an employee. Mr. Strack edited Defendant's book, All About America, and assisted with marketing the book to various school systems. Mr. Strack said, however, that the company did not have sufficient funds to pay him a salary. Mr. Strack stayed with the company for approximately fourteen or fifteen months, and then returned to the newspaper business in the spring of 2003 after he had depleted his personal savings and credit lines.

Mr. Strack said that Defendant's book contained information about American government and history that Defendant believed was not being sufficiently taught in schools. Defendant initially sought federal funding to place the book in every tenth and fifth grade class in the United States. After he was unsuccessful in this endeavor, Mr. Strack helped Defendant market the book directly to school systems across the country. Mr. Strack explained, however, that most school superintendents were reluctant to recommend adding the book to their respective school's curriculum

without federal funding. Mr. Strack stated that he still believed in Defendant's project, and Defendant had worked hard to bring the project to fruition. Mr. Strack said that on several occasions, he and Defendant believed that they were going to be able to secure the necessary funding.

John Storey testified that he owned a small printing company in Carrollton, Georgia, when he first met Defendant in1990. Defendant placed an order for the printing of stationery, envelops and business cards with Mr. Storey's company. At some point in 1995, Defendant asked Mr. Storey to typeset his book, All About America. Mr. Storey said that at that time the book contained only a copy of the United States Constitution and the Declaration of Independence. Mr. Storey suggested to Defendant that he include additional information in the book in order to make it more marketable, and the book subsequently went through many revisions.

Mr. Storey acknowledged that he was listed as president of American Heritage Publishing, Inc. on one of the versions of Defendant's book and was scheduled to receive one dollar for every book sold. Mr. Storey stated that he also personally paid for some of Defendant's trips to Washington D.C. to seek federal funding for the project and to the Wal-Mart home office in Arkansas.

Mr. Storey said that he met the Defendant in Washington D.C. on one occasion in the late 1990's. The two men met with various Senate staff members and explained Defendant's book project. Mr. Storey said that in 1998 and again in 1999, resolutions were introduced in Congress which encouraged state and local educational agencies to set aside one day for the study of the Declaration of Independence, the United States Constitution, and the Federalist Papers. In 2005, federal legislation was passed requiring educational institutions receiving federal funding to hold an education program pertaining to the United States Constitution on September 17, which was designated "Constitution Day and Citizen Day." Mr. Storey said that Defendant lobbied for passage of the resolutions and legislation for several years.

On cross-examination, Mr. Storey stated that he was no longer affiliated with American Heritage Publishing. Mr. Storey acknowledged that he had never received any compensation from the company. Mr. Storey agreed that passage of the legislation establishing Constitution Day and Citizenship Day did not mean that Defendant's book would be purchased by school systems, but he said that it would be an option. Mr. Storey was not aware that the legislation did not authorize federal funding for the implementation of the program by school systems.

On redirect examination, Mr. Storey stated that he had spent countless hours on the project in the past eleven years and contributed all of his savings to the company. Mr. Storey said that it was his understanding that the project was still ongoing.

Calvin Haynes testified that he lived in Tuscaloosa, Alabama, and he first met Defendant in the spring of 1998. Mr. Haynes said that he bought stock in Defendant's company, but he

acknowledged that he had not yet received any dividends. Mr. Haynes said, however, he believed in the project and had "no doubt" that the project would eventually be successful.

David Jette, a customer service supervisor with Quebecor World Printing in Dupuy, New York, testified that he first became involved with Defendant's "All About America Project" in 1998. Mr. Jette stated that his company printed 20,000 copies of Defendant's book, All About America, in approximately 2000. A second version was printed at some point in either 2003 or 2004. Mr. Jette said that it was his belief that Defendant's project was still viable, and that Defendant was attempting to secure the funding for the project. On cross-examination, Mr. Jetts said that his company had incurred approximately $20,000 in costs connected with the printing of Defendant's book.

II. Sufficiency of the Evidence

When a defendant challenges the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced on appeal with a presumption of guilt. State v. Black, 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. Id.; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The jury is presumed to have resolved all conflicts and drawn any reasonable inferences in favor of the State. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

A. Theft of Property

Defendant was convicted of three counts of theft of property valued between $1,000 and $10,000 based on the one check received by Defendant from Mr. Thompson in the amount of $10,000, and the two checks received by Defendant from Ms. Jones in the amount of $2,500 each. "A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent." T.C.A. § 39-14-103. Therefore, to obtain a theft conviction, the state must establish "(1) the defendant knowingly obtained or exercised control over property; (2) the defendant did not have the owner's effective consent; and (3) the defendant intended to deprive the owner of the property." State v. Amanns, 2 S.W.3d 241, 244-45 (Tenn. Crim. App. 1999). Consent is not effective if it is induced by deception. T.C.A. § 39-11-106(a)(9)(A) (2003). Furthermore, a person "deprives" an owner of property when he or she disposes of the property, uses it, or transfers an interest in the

property in such a manner as to make restoration unlikely. Id. § 39-11-106(a)(8)(C) (2003). "Property" means anything of value including money. Id. 39-11-106(28).

Defendant argues that the evidence was insufficient to support a finding that he intended to deprive Mr. Thompson or Mr. Jones of their money. Defendant submits that Mr. Thompson and Ms. Jones received shares of stock in his company, American Heritage Publishing, and that the company was an ongoing business venture that simply had not yet made a profit.

The intent to deprive an owner of property may be established by circumstantial evidence. See State v. Scales, 524 S.W.2d 929, 931 (Tenn. 1975). In addition, a "jury may infer a criminal defendant's intent from the surrounding facts and circumstances." State v. Roberts, 943 S.W.2d 403, 410 (Tenn. Crim. App. 1996), overruled on other grounds by State v. Ralph, 6 S.W.3d 251 (Tenn. 1999).

Viewing the evidence in a light most favorable to the State, Mr. Thompson and Ms. Jones testified that they invested in Defendant's company because Defendant told them he had a contract in place with Wal-Mart, Inc., for the sale of the company's products, beginning on July 4, 2004, and both anticipated a large return on their investment as a result of this business arrangement based upon Defendant's statements to them. Defendant also told Ms. Jones that his book would be sold to school systems nationwide. At Defendant's request, Mr. Thompson and Ms. Jones made out their checks personally to Defendant instead of American Heritage Publishing, Inc., and Defendant personally endorsed and cashed the checks. Ms. Carmen Jones testified that her investigation revealed that no deposit corresponding to the amount of investments by Mr. Thompson or Ms. Jones were made into Defendant's business accounts, including the accounts for American Heritage Publishing, Inc. Both Mr. Thompson and Ms. Jones testified that Defendant refused to show them the company's financial records or any business documents, including the contract with Wal-Mart. Defendant continued to assure Mr. Thompson and Ms. Jones that they would receive a large return on their investment. Mr. Thompson said that Defendant told him that the "money was in place" and was "ready to be distributed" as soon as the second stock certificate in the name of American Heritage Publishing and Merchandising, Inc. was distributed. Defendant's book was not offered for sale in a local Wal-Mart store on July 4, 2004, and Ms. Jones and Mr. Thompson said that they never received any dividends or other returns on their investment.

Based on our review, the intent required for theft could be inferred by the jury based on the facts and circumstances surrounding Defendant's conduct before and after his acceptance of the checks from Mr. Thompson and Ms. Jones, which they believed represented an investment in American Heritage Publishing, Inc., and that Defendant did not have Mr. Thompson's or Ms. Jones' effective consent to deprive them of their money. Accordingly, we conclude that a rational trier of fact could find beyond a reasonable doubt that Defendant was guilty of theft of property valued between $1,000 and $10,000 as charged in each of the three counts of the indictment. Defendant is not entitled to relief on this issue.

B. Securities Act Violations

Defendant also challenges the sufficiency of the evidence supporting his convictions of violations of the Securities Act in counts 2, 4, 7, 8, and 11 of the indictment. However, before addressing Defendant's sufficiency challenge, we are constrained to address what we perceive to be two flaws contained in these counts of the indictment as plain error. See Tenn. R. App. P. 36(b). As Tennessee law provides, defects in or objections to an indictment based upon failure to show jurisdiction or failure to charge an offense "shall be noticed by the court at any time during the pendency of the proceedings[.]" Tenn. R. Crim. P. 12(b)(2); Wyatt v. State, 24 S.W.3d 319, 323 (Tenn. 2000); State v. Clark, 2 S.W.3d 233, 236 (Tenn. Crim. App. 1998).

An accused is constitutionally guaranteed the right to be informed of the nature and cause of the accusation. U.S. Const. amend. 6, 14; Tenn. Const. art. I, § 9; see Wyatt, 24 S.W.3d at 324. "Further, an indictment is statutorily required to "state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment." State v. Lindsey, 208 S.W.3d 432, 437-38 (Tenn. Crim. App. 2006) (citing T.C.A. § 40-13-202). "Generally stated, an indictment is valid if it provides sufficient information (1) to enable the accused to know the accusation to which answer is required, (2) to furnish the court an adequate basis for the entry of a proper judgment, and (3) to protect the accused from double jeopardy." State v. Hill, 954 S.W.2d 725, 727 (Tenn. 1997)

In this regard, various opinions of our supreme court have held "that an indictment which references the statute defining the offense is sufficient and satisfies the constitutional and statutory requirements of Hill." State v. Hammonds, 30 S.W.3d 294, 300 (Tenn. 2000) (citing State v. Sledge, 15 S.W.3d 93, 94 (Tenn. 2000) (holding an indictment alleging that the defendant "did unlawfully kill [the victim] during the perpetration of Aggravated Robbery, in violation of T.C.A. 39-13-202" sufficient because it contained a specific reference to the statute which was "sufficient to place the accused on notice of the charged offense"); Ruff v. State, 978 S.W.2d 95, 100 (Tenn. 1998) (holding that "an indictment which cites the pertinent statute and uses its language will be sufficient to support a conviction").

In count 2 of the indictment, Defendant was charged with "unlawfully and knowingly sell[ing] an unregistered security to W. R. Thompson, in violation of T.C.A. [§] 48-2-104." In counts 7 and 8, Defendant was charged with "unlawfully and knowingly sell[ing] an unregistered security to Bridget Jones, in violation of T.C.A. [§] 48-2-104." In counts 4 and 11, Defendant was charged, as to victims W. R. Thompson and Bridget Jones respectively, with "unlawfully and knowingly in connection with the sale or purchase of securities in this state, directly or indirectly (1) employ[ing] a device, scheme, or artifice to defraud; (2) mak[ing] an untrue statement of a material fact or omit[ting] to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or (3) engag[ing] in an act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in violation of T.C.A. 48-2-121."

Counts 2, 4, 7, 8, and 11 of the indictment for the most part track the statutory language in sections 48-2-104 and 48-2-121 prohibiting the sale of unregistered securities and fraudulent acts in connection with the sale of a security respectively. Violations of sections 48-2-104 and 48-2-121, however, in and of themselves, are not punishable as crimes. Instead, these statutory provisions subject an alleged violator to civil, rather than criminal, liability. Section 48-2-104 is entitled "Securities Registration Requirement – Civil penalty" and provides that persons who sell unregistered securities in this state may be subject to a civil penalty "not to exceed ten thousand dollars." T.C.A. 48-2-104. Moreover, the Securities Act, in relevant part, provides that an individual who sells a security in violation of § 48-2-104, or sells a security in violation of § 48-2-121(a), "shall be liable to the person purchasing the security from the seller to recover the consideration paid for the security, together with interest at the legal rate from the date of payment, less the amount of any income received on the security, upon the tender of the security, or, if the purchaser no longer owns the security, the amount that would be recoverable upon a tender, less the value of the security when the purchaser disposed of it and interest at the legal rate from the date of disposition." T.C.A. § 48-2-122(a)(1).

The legislature, however, did provide that certain conduct regulated by the Securities Act may subject a person to criminal liability. Tennessee Code Annotated section 48-2-123 mandates punishment for any person who "willfully violates any provision of this part or who willfully violates any rule or order under this part," and provides that such violations are classified as a Class D felony. (Emphasis added). The statute also prescribes that "no person may be imprisoned for the violation of any rule or order if the person proves that the person had no actual knowledge of the rule or order." Id.

Thus, the statute at issue clearly creates two classes of offenders under the Securities Act, non-criminal offenders and criminal offenders. State v. Michael Casper, No. M2006-02538-CCA-R3-CD, 2008 WL 2648954, at *10 (Tenn. Crim. App., at Nashville, July 3, 2008), perm. to appeal granted. In the case sub judice, the specific statutory sections, sections 48-2-104 and 48-2-121, cited in counts 2, 4, 7, 8, and 11 of the indictment, do not charge an offense for which Defendant may be criminally liable. Rather, the indictment as worded alleges that Defendant has civilly violated these provisions of the Securities Act. The statutory section defining a criminal offense under the Securities Act, Section 48-2-123, is not cited in the indictment. See Sledge, 15 S.W.3d at 95. The indictment thus fails to furnish to the court an adequate basis for entry of a judgment convicting Defendant of a criminal violation of the Securities Act. See Hill, 954 S.W.2d at 727; State v. Cleveland, 959 S.W.2d 548, 552 (Tenn. 1997) (concluding that a defendant cannot be legally convicted of an offense which is not charged in the indictment).

Moreover, the indictment charges Defendant with knowingly violating sections 48-2-104 and 48-2-121 of the Securities Act. However, in order to support a criminal conviction for securities violations, the legislature requires the State to prove that the violations were willful. T.C.A. § 48-2-123(a). The indictment neither refers to section 48-2-123(a) nor does the indictment reference the term "willful."

Based on our review, we conclude that the reference in the indictment to sections 48-2-104 and 48-2-121, standing alone, is insufficient to allow the trial court to pronounce a judgment for a criminal conviction, and counts 2, 4, 7, 8, and 11 of the indictment are therefore fatally flawed. Accordingly, we reverse Defendant's convictions as to these counts of the indictment and dismiss counts 2, 4, 7, 8, and 11 of the indictment.

III. Sentencing Issues

At the sentencing hearing, Bridget Jones described the financial and emotional trauma caused by Defendant's conduct. Ms. Jones testified that she invested in Defendant's projects because she had outstanding medical bills related to her cancer treatment. Ms. Jones hoped the investment would bring financial relief to her family, and she said that Defendant and his wife "presented a great case." After the investments were made, Ms. Jones stated that she made multiple efforts to contact Defendant and made herself available for those times when Defendant said he would be in Murfreesboro. Ms. Jones said that these efforts adversely impacted her real estate activities and therefore her income.

W. R. Thompson testified that Defendant offered to purchase his home for cash, but then Defendant postponed the closing a total of approximately ten times. Mr. Thompson said that he needed to sell the house because he was going through a divorce, and he repeatedly told his former wife that he believed that Defendant would carry out his promises. Mr. Thompson said that his former wife lost the lease on her apartment, and both of them waited for months for the sale of Mr. Thompson's house to close. Mr. Thompson said that he repeatedly tried to contact Defendant over the months, and then Defendant told Mr. Thompson to stop calling. Mr. Thompson said that Defendant listed his name on Defendant's web page as a "non-supporter" of the American Veterans Hall of Honor despite Mr. Thompson's investment in Defendant's project.

According to the presentence report, Defendant was sixty-nine years old at the time of the sentencing hearing. Defendant reported that he obtained his G.E.D. while serving in the United States Navy from 1956 until 1967. Defendant described his mental health as "excellent," but he stated that he suffers from diabetes, asthma, and high blood pressure. Defendant's medications include insulin, lisinopril, atenolol, glipizide, and albuterol inhalers. Defendant reported receiving monthly social security and veterans' disability payments in the aggregate amount of $1,200. Defendant reported monthly expenses in the amount of $800.00 for rent and $430.00 for telephone service. Defendant has one prior federal felony conviction in 1977 for "false entry in report of post billet fund." Defendant was sentenced to five years, all of which was suspended and Defendant was placed on probation for five years.

Defendant submitted a written statement concerning the commission of the offenses in connection with the preparation of the presentence report as follows:

> I made a trip to the Sec[retary] of State in Nashville to inquire about issuing shares in a book project that is on-going. I was told if I had fewer than [fifteen] people the

> shares did not need registering. I have fewer tha[n] the required number. Two of [the] people have no objection to publishing the book[;] what they object to is the amount of time it has taken to get the book revised and the value updated so the price is high enough to pay the cost and make a profit. The process is close to being finished.

At the conclusion of the sentencing hearing, the trial court did not find the presence of any mitigating factors. The trial court found that one enhancement factor was applicable based on Defendant's history of criminal conduct. See T.C.A. § 40-35-114(1). The trial court considered Defendant's 1977 felony conviction as well as the evidence presented at trial that Defendant had solicited investors other than Ms. Jones and Mr. Thompson, and continued to operate his web page which was capable of receiving donations to Defendant's project. Based on the presence of no mitigating factors, and one enhancement factor, the trial court sentenced Defendant as a Range I, standard offender, to three years for each Class D felony conviction.

The trial court found that consecutive sentencing was proper stating that:

> I think he had become a person who had become a professional criminal in that he knowingly devoted himself to criminal acts as a major source of his livelihood. Other than the disability checks that he received, I think this was how he made his money. That's the reason I ordered them to be served consecutively.

The trial court accordingly ordered Defendant to serve his sentence for theft of property in count one consecutive to the remaining sentences, for an effective sentence of six years.

The trial court denied Defendant's request that he be allowed to serve his sentences on probation. The trial court stated:

> I am satisfied that [Defendant] is someone who has in this case evinced a clear disregard for the laws and morals of society. The sentencing consideration that I'm struggling with is whether confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct. I don't know if you – long history. We know of at least three cases where he has taken people's money with his stories and schemes. And large sums of money. And as I have said I think he was making his livelihood from taking money from people in the way that he did. I think that he did it enough times in evidence before the Court that he ought to serve these sentences in their entirety.

On appeal, Defendant argues that the length of his sentence should be reduced, and the trial court erred in imposing consecutive sentencing. Defendant also contends that the trial court erred in denying his request for alternative sentencing and submits that he is a suitable candidate for probation because he is not a threat to society, does not have a lengthy criminal history, and is in poor health.

A. Standard of Review

Defendant's offenses were committed prior to the 2005 amendments to the 1989 Sentencing Act which are effective for criminal offenses committed on or after June 7, 2005. See 2005 Tenn. Pub. Acts, ch. 353, § 18 (providing that offenses committed prior to June 7, 2005, shall be governed by prior law unless the defendant executes a waiver of his or her ex post facto protections which was not done in the case sub judice). Accordingly, Defendant's sentence is governed by the provisions of the 1989 Sentencing Act.

On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is improper. See T.C.A. § 40-35-401, Sentencing Comm'n Comments; see also State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). When a defendant challenges the length, range, or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that the determinations made by the court from which the appeal is taken are correct. T.C.A. § 40-35-401(d). This presumption of correction, however, "'is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.'" State v. Carter, 254 S.W.3d 335, 344-45 (Tenn. 2008) (quoting State v. Ashby, 823 S.W.2d 166, 169 Tenn. 1991)). "If, however, the trial court applies inappropriate mitigating and/or enhancement factors or otherwise fails to follow the Sentencing Act, the presumption of correctness fails," and our review is de novo. Carter, 254 S.W.3d at 345 (quoting State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1002); State v. Pierce, 138 S.W.3d 820, 827 (Tenn. 2004)).

In conducting a de novo review of a sentence, this Court must consider

> (1) [t]he evidence, if any, received at the trial and the sentencing hearing; (2) [t]he presentence report; (3) [t]he principles of sentencing and arguments as to sentencing alternatives; (4) [t]he nature and characteristics of the criminal conduct involved; (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and (6) [a]ny statement the defendant wishes to make in the defendant's own behalf about sentencing.

T.C.A. § 40-35-210.

As a Range I, standard offender, convicted of a Class D felony, Defendant is subject to a sentence of between two and four years. T.C.A. § 40-35-112(4). Under the applicable law, unless enhancement factors were present, the presumptive sentence to be imposed was the minimum in the range for a Class D felony, or two years in the case sub judice. Id. § 40-35-210(c) (2003). The pre-2005 sentencing act provided that, procedurally, the trial court was to increase the sentence within the range as appropriate based on the existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. Id. at (d), (e). However, the Tennessee Supreme Court recently held that for sentences imposed pursuant to Tennessee's former sentencing act, other than the fact of a prior conviction or facts admitted by the defendant, the trial court's enhancement of a

defendant's sentence based on factors that had not been found by a jury beyond a reasonable doubt violated a defendant's Sixth Amendment right to a jury trial as interpreted by the Supreme Court. State v. Gomez, 239 S.W.3d 733, 741 (citing Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 860 (2007)); see also Blakely v. Washington, 542 U.S. 296, 301; 124 S.Ct. 2531, 2536 (2004) (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63 (2000)) ("'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'").

In the case sub judice, the trial court found as an enhancement factor that Defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range. T.C.A. § 40-35-114(1). The trial court found no mitigating factors were applicable and sentenced Defendant to three years for each Class D felony conviction, or one year above the presumptive sentence in the range. In support of application of enhancement factor (1), the trial court found, in part, that Defendant had previously engaged in criminal behavior. This finding was based not on Defendant's admission to criminal behavior, either at trial or at the sentencing hearing, but on Ms. Wilson's trial testimony concerning her investment in Defendant's company. See State v. Anthony Riggs, No. M2007-02322-RM-CD, 2008 WL 1968826, at *4 (Tenn. Crim. App., at Nashville, May 7, 2008, no perm. to appeal filed (noting that "[a]t the least, we believe that an admission sufficient to support the enhancement of a defendant's sentence under Blakely must rest upon a defendant's unequivocal testimony, at trial or at the sentencing hearing, or a factual acknowledgment in the presentence report is introduced as an exhibit at the sentencing hearing without objection). Nonetheless, Defendant has one prior conviction which supports consideration of enhancement factor (1), and this factor is entitled to sufficient weight to justify the enhancement of Defendant's sentence by one year. Gomez, 239 S.W.3d at 740. Defendant is not entitled to relief on this issue.

B. Consecutive Sentencing

In considering the manner of Defendant's service of his sentences, the trial court found:

> I guess my concern in this case centers around I think probably at some point this was a legitimate effort that [Defendant] was making and somehow he found out that appealing to people's ardor for patriotism and support of this country that he could get their money and then just consider it his. And that's what he did in these two cases very clearly. And I think the thing that causes me concern is that he's done it to other people and that he continues to solicit funds on the internet. And, of course, we don't know but you have to be concerned that he's using those funds the same way he used the funds of the two victims in this case. And that I think causes me great concern. . . . I think he had become a person who had become a professional criminal in that he knowingly devoted himself to criminal acts as a major source of his livelihood. Other than the disability checks that he received I think this was how he made his money.

Defendant argues that the evidence presented at the sentencing hearing does not support the trial court's finding that he is a professional criminal for whom consecutive sentencing is appropriate. Defendant submits that the record shows that he was engaged in a viable project with ongoing expenses, and that he derived his income from his disability payments.

A trial court may order sentences to run consecutively if it finds by a preponderance of the evidence, as relevant in the case sub judice, that the defendant is a "professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood." T.C.A. § 40-35-115(b)(1). The general principles of sentencing require that the length of sentence be "justly deserved in relation to the seriousness of the offense" and "be no greater than that deserved for the offense committed." State v. Imfeld, 70 S.W.3d 698, 708 (Tenn. 2002) (citing T.C.A. §§ 40-35-102(1) and -103(2)). Rule 32(c)(1), Tenn. R. Crim. P., requires that the trial court "specifically recite the reasons" behind its imposition of a consecutive sentence.

In State v. Desirey, 909 S.W.2d 20 (Tenn. Crim. App. 1995), this Court addressed the issue of what constitutes a professional criminal, placing emphasis on the terms "professional" and "major source of his livelihood." Id. at 32. In that case, the defendant was found to be a professional criminal because his long-standing numbers operation took in $2,000.00 to $2,500.00 per day, had done over $200,000.00 a week in business and had paid employees as much as $15,000.00 a year. His weekly income of from $2,000.00 to $3,000.00 from illegal gambling, the extended length of time he had been in the numbers business and his leadership in the illegal enterprise justified a finding that the Defendant was a professional criminal who derived a major source of his income from illegal gambling. See also State v. Mickens, 123 S.W.3d 355, 396 (Tenn. Crim. App. 2003) (holding that evidence established that the defendant was a professional criminal as the basis for imposing consecutive sentences where the defendant had never had gainful employment and was the "governor" of a regional criminal gang); State v.Clifford Leon Farra, No. E2001-02235-CCA-R3-CD (Tenn. Crim. App., at Knoxville, Dec. 10, 2003 .), perm. to appeal denied (Tenn. May 10, 2004) (concluding consecutive sentencing appropriate based on the defendant's tax returns showing income ranging from $0 to $5000 while defendant continued to pay for home mortgage, cars, coins, motor scooters, gun collection, and a lease on a motor home); State v. Frank Michael Vukelich, No. M1999-00618-CCA-R3-CD (Tenn. Crim. App., at Nashville, Sept. 11, 2001), perm. to appeal denied (Tenn. Apr. 1, 2002) (concluding that evidence established that the defendant was a professional criminal when the record indicated the defendant was a major marijuana dealer for several years and used the proceeds to partially finance his legitimate business and purchase a house and a boat); State v. Van Rockford Trent, C.C.A. No. 858, 1989 WL 105674, at *6 (Tenn. Crim. App., Sept. 13, 1989), perm. to appeal denied (Tenn. Feb. 5, 1990) (concluding that the "magnitude of this criminal undertaking, [the operation of a marijuana production facility], and the length of time he devoted" to the enterprise supported a finding that the defendant was a professional criminal).

In the instant case, according to the presentence report, Defendant lives with his girlfriend, Kathy Lowry, and has been retired for fourteen years. Defendant reported monthly income of approximately $1,200 in disability payments and expenses of approximately the same amount. Unlike the presence of ongoing criminal activity over a substantial period of time in Desirey and

Frank Michael Vukelich, the evidence at trial established that Defendant received three checks from Mr. Thompson and Ms. Jones in the aggregate amount of $15,000 over a span of approximately six and one-half months. The checks were made out to Defendant in his individual capacity, and Defendant cashed the checks. Although an examination of the financial books of Defendant's companies did not reveal a deposit to the various business bank accounts comparable to the amounts invested by the victims, the State did not offer any evidence that these funds were used as a major source of Defendant's livelihood. Moreover, Defendant has only one prior conviction which occurred over two decades before the instant offenses.

We observe that the trial court also considered relevant the testimony presented at trial concerning Defendant's web site for the American Veterans Hall of Fame and its potential for accepting donations to the project. The State, however, did not offer any proof that funds were actually received through the web site or, if donations were received, the amount of the donations, and whether Defendant used such funds to support himself.

Based on our review, we conclude that the evidence does not support the trial court's finding that Defendant was a professional criminal who devoted his life to criminal acts as a major source of livelihood.

C. Denial of Request for Alternative Sentencing

Defendant also challenges the trial court's denial of his request for alternative sentencing. Under the applicable law, a defendant who does not possess a criminal history showing a clear disregard for society's laws and morals, who has not failed past rehabilitation efforts, and who is "an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Id. § 40-35-102(6); see also State v. Fields, 40 S.W.3d 435, 440 (Tenn. 2001). The following considerations provide guidance regarding what constitutes "evidence to the contrary" that would rebut the presumption of alternative sentencing:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

T.C.A. § 40-35-103(1); see also State v. Hooper, 29 S .W.3d 1, 5 (Tenn. 2000).

In determining whether to grant probation, the court must consider the nature and circumstances of the offense; the defendant's criminal record; his or her background and social history; his or her present condition, both physical and mental; the deterrent effect on the defendant; and the defendant's potential for rehabilitation or treatment. See T.C.A. § 40-35-103.

Because Defendant was convicted of Class D felonies, he is entitled to the presumption that he is a favorable candidate for alternative sentencing. See id. § 40-35-102(6). We note, however, that "[t]he determination of whether the appellant is entitled to an alternative sentence and whether the appellant is entitled to full probation are different inquiries." State v. Boggs, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). Where a defendant is entitled to the statutory presumption of alternative sentencing, the state has the burden of overcoming the presumption with evidence to the contrary. State v. Bingham, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995), overruled on other grounds by Hooper, 29 S.W.3d at 9-10. Conversely, the defendant has the burden of establishing his or her suitability for full probation, even if the defendant is entitled to the statutory presumption of alternative sentencing. Id.; see Boggs, 932 S.W.2d at 477. No criminal defendant is automatically entitled to probation as a matter of law. T.C.A. § 40-35-303(b), Sentencing Comm'n Cmts. Rather, the defendant must demonstrate that probation would "subserve the ends of justice and the best interests of both the public and the defendant." State v. Souder, 105 S.W.3d 602, 607 (Tenn. Crim. App. 2002) (citations omitted).

In denying Defendant's request for alternative sentencing, the trial court found that confinement was necessary to protect society from Defendant's future conduct. The trial court stated:

> I don't know if you – long history. We know of at least three cases where he has taken people's money with his stories and schemes. And large sums of money. And as I have said, I think he was making his livelihood from taking money from people in the way that he did. I think that he did it enough times in evidence before the Court that he ought to serve these sentences in their entirety.

Based on our review, we conclude that the trial court did not abuse its discretion in denying Defendant's request for alternative sentencing. Defendant is not entitled to relief on this issue.

CONCLUSION

After a thorough review, we conclude, as plain error, that counts 2, 4, 7, 8, and 11 of the indictment are fatally defective and reverse and dismiss Defendant's convictions as to these counts. We affirm the trial court's judgments as to Defendant's theft convictions in counts 1, 5, and 6. We affirm the trial court's judgments as to the length of Defendant's sentences for his theft convictions. We remand, however, Defendant's judgments in counts 1, 5, and 6 to reflect that all sentences are to be served concurrently, for an effective sentence of three years.

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THOMAS T. WOODALL, JUDGE